84-1622

No. ____

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

ROOSEVELT THEODORE BECTON, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HOWARD L. WEITZMAN
A Professional Law Corporation
HOWARD L. WEITZMAN
9911 W. Pico Boulevard,
Suite 1000,
Los Angeles, CA. 90035,
(213) 277-8366,

Attorney for Petitioner.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

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QUESTIONS PRESENTED

1. Does a continuing criminal enterprise count which fails to identify the three underlying predicate felony acts found by the grand jury deny the accused his Fifth Amendment right to be tried only for the acts found and charged by the grand jury?

2. Does an indictment which fails to identify the three underlying predicate felonies constituting the series of felonies necessary to establish a continuing criminal enterprise count deny the accused the protection of the double jeopardy clause of the Fifth Amendment?

3. Does the grand jury's failure to state the three felony predicate offenses it relied upon to find a continuing criminal enerprise count deny the accused his Sixth Amendment right to notice of the charge against him?

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ROOSEVELT THEODORE BECTON, JR.,
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VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Roosevelt Theodore Becton, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINION BELOW

The opinion of the Court of Appeals is reported as *United States v. Becton*, 751 F.2d 250 (8th Cir. 1984).[1] The United States District Court for the Eastern District of Missouri, Eastern Division, issued no written opinion.

JURISDICTION

The opinion of the Court of Appeals was filed on December 27, 1984. A timely petition for rehearing *en banc* was

[1]This opinion is set forth in appendix A.

denied on February 11, 1985.[2] This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution.
Amendment VI to the United States Constitution.
Title 21, U.S.C. § 848.[3]

STATEMENT OF THE CASE

The United States District Court, Eastern District of Missouri, Eastern Division, had jurisdiction pursuant to Title 18, U.S.C. § 3231.

Petitioner was convicted of conducting a Continuing Criminal Enterprise (enterprise) in violation of 21 U.S.C. § 848 (Count one), two violations of the Travel Act, 18 U.S.C. § 1952 (Counts three and four), and possession of cocaine in violation of 21 U.S.C. § 844 (Count six).[4]

Petitioner was sentenced to a term of twenty-five years on the enterprise count, to five years on each of the travel act counts, and to one year on the cocaine count. The latter three sentences were to run concurrent with the enterprise sentence. Fines totalling fifty thousand dollars were imposed.

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[2]The denial is set forth in appendix B.

[3]The text of these provisions is set forth in appendix C.

[4]Count two, charging a conspiracy in violation of Title 21, U.S.C. § 846 and Count five, charging a violation of Title 21, U.S.C. § 841(a), were withdrawn from the jury as lesser included offenses of the enterprise count. Prior to trial, a severance was granted on Counts seven (Title 26, U.S.C. § 7206(1)) and eight (Title 18, U.S.C. § 371). These counts were subsequently dismissed at the request of the prosecution.

Count one pled the enterprise in the language of the statute, alleging that petitioner "did unlawfuliy, . . . violate a continuing series of felony violations of the Controlled Substances Act . . . , in concert with at least five other persons." The grand jury did not specify in any way the acts alleged to constitute the series of felony violations, nor did it identify the five or more persons petitioner supervised. Motions to dismiss the indictment and for bill of particulars based, in part, upon the insufficiency of the pleadings as to the enterprise allegation were filed.[5] No other counts were incorporated by reference into this count. The petit jury was instructed that they could consider "either a charged violation of the indictment or an uncharged felony violation as adduced from the evidence you heard in this trial" in deciding whether the requisite series of felony violations existed.

Petitioner argued before the Court of Appeals that the enterprise count violated his rights under the Fifth and Sixth Amendments to the United States Constitution in that: (1) the failure to set forth the felonies allegedly committed by date and code section deprived him of the right to be tried for the offense actually found by the grand jury, (2) the failure to specify the alleged predicate acts made it impossible for him to assert the defense of former jeopardy at any subsequent prosecution for narcotic offenses occurring before the indictment here, and (3) the indictment failed to inform him of the nature and cause of the accusation against him.

Petitioner's argument that there was no way to determine whether he was actually tried for and convicted of

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[5]These motions are set forth in appendices D and E. The Court of Appeals apparently overlooked these motions when it claimed that petitioner's challenge to the sufficiency of the pleadings on the enterprise count was not made before the trial court. 751 F.2d at 256.

the predicate acts that the grand jury found in returning the enterprise count was not discussed by the Court of Appeals.[6] In answer to petitioner's contention that the indictment was insufficient to protect him from double jeopardy the Court of Appeals held that an enterprise charge would seem to include any federal narcotics violations committed within the time frame set forth in that charge. 751 F.2d at 257. The Court of Appeals acknowledged that the enterprise count did not specify the underlying felony violations or identify the persons that petitioner supervised. 751 F.2d at 253. However, it concluded that Count two, a conspiracy count, and Count five, a substantive marijuana count, provided sufficient notice of the felony violations underlying the Count one enterprise to satisfy due process.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons: the petition presents issues now before this Court in other matters, the opinion below conflicts with previous decisions of this Court, and it conflicts with decisions of other circuits.

This Court has pending before it two cases involving issues similar to those presented in this petition. *United States v. Miller,* 515 F.2d 1360 (9th Cir. 1983), *modified,* 728 F.2d 1269, *cert. granted,* 105 S.Ct. 78 (1984), presents the question whether an accused may be convicted for an offense different than that found by the grand jury, and *United States v. Garrett,* 727 F.2d 1003 (11th Cir.), *cert. granted,* 105 S.Ct. 78 (1984), presents the question whether an accused may be subsequently prosecuted for an enterprise,

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[6]The Court of Appeals acknowledged that the jury instructions relating to the enterprise did not specify the offenses that petitioner had allegedly committed. However, it held that the issue had not been preserved below. 751 F.2d at 257.

alleging as a predicate act a substantive offense that the accused had previously been convicted of.

The decision of the Court of Appeals upholding the enterprise count as pled conflicts with decisions of this Court requiring an accused to be tried for the specific conduct charged by the grand jury, *Russell v. United States,* 369 U.S. 749, 759, 766, 768 (1962); *Stirone v. United States,* 361 U.S. 212, 216 (1960); *Ex Parte Bain,* 121 U.S. 1, 13 (1887), decisions protecting the accused against double jeopardy, *Russell v. United States, supra; United States v. Debrow,* 346 U.S. 374, 376 (1953), and decisions requiring each count of the indictment independently to provide notice to the accused of the offense charged against him. *Hamling v. United States,* 418 U.S. 87, 117 (1974); *Dunn v. United States,* 234 U.S. 390, 393 (1932); *United States v. Cruikshank,* 92 U.S. 532, 557-59 (1887).

Additionally, the opinion conflicts with decisions of other circuits permitting a conviction only on the specific acts (predicate offenses) alleged by the grand jury. *United States v. Cusmano,* 659 F.2d 714 717-19 (6th Cir. 1981); *United States v. Stewart Clinical Laboratory, Inc.,* 652 F.2d 804, 807 (9th Cir. 1981); *United States v. Crocker,* 568 F.2d 1049 (3rd Cir. 1977). It conflicts with decisions of other circuits regarding double jeopardy protection against subsequent drug prosecutions after judgment in an enterprise prosecution, *United States v. Chagra,* 653 F.2d 26, 31-35 (1st Cir. (1981), *cert. denied,* 455 U.S. 907 (1982), *United States v. Oberski,* 734 F.2d 1030, 1033 (5th Cir. 1984), and, by implication, *United States v. Bendis,* 681 F.2d 561, 565, n.5 (9th Cir. 1981), *cert. denied,* 459 U.S. 973 (1982), and with decisions regarding the sufficiency of pleadings in statutory language. *United States v. Conlon,* 628 F.2d 150, 155, 156 (D.C. Cir. 1980), *cert. denied,* 454 U.S. 1149 (1982).

The Courts of Appeals are confronted with the questions presented by this petition in ever increasing numbers.[7] The conflicting decisions in these areas require resolution by this Court. The sufficiency of the pleadings in enterprise and RICO (Racketeer Influenced Corrupt Organizations, 18 U.S.C. §§1961, *et seq.*) prosecutions, both of which require proof of multiple acts and the existence of an "enterprise" is an issue of great importance to the administration of justice in the federal courts, and should be addressed by this Court.

A.

A CONTINUING CRIMINAL ENTERPRISE COUNT WHICH FAILS TO IDENTIFY THE UNDERLYING PREDICATE ACTS FOUND BY THE GRAND JURY DENIES THE ACCUSED HIS FIFTH AMENDMENT RIGHT TO BE TRIED ONLY FOR CRIMES CHARGED BY A GRAND JURY.

By stating that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury" the Fifth Amendment to the United States Constitution sets forth the means for initiating the prosecution of a felony offense in the federal courts. The court obtains jurisdiction to try an accused after the return of an indictment. Any change in the allegations found by the grand jury deprives the court of jurisdiction to proceed. *Ex parte Bain, supra,* 121 U.S. at 13, 14. The accused must be tried for the specific offense charged by the grand jury, not an offsense suggested by the prosecutor or trial court, or an offense found by the trier of fact

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[7]During the ten years from 1970 to 1980 there were 85 enterprise indictments in the United States. In the next three years 150 indictments were returned. Drug Law Report, Vol. 9, May-June, 1984, p.11.

or appellate court. *Russell v. United States, supra,* 369 U.S. at 759, 766, 768; *Stirone v. United States, supra,* 361 U.S. at 216; *Ex Parte Bain, supra,* 121 U.S. at 13.

To ensure that the accused is tried only for conduct found and alleged by the grand jury, this Court has held that an indictment must be sufficiently particular to identify the offense charged:

> "A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell v. United States, supra,* 369 U.S. at 770.

The enterprise count here alleged that petitioner engaged in "a continuing series of felony violations . . . in concert with at least five other persons . . ." The three violations were not defined by date or section number, and the five persons were not identified. No other counts of the indictment were incorporated into the enterprise count. Only two other counts dealt with felony violations of the Controlled Substance Act: Count two alleged a conspiracy to distribute and possess with intent to distribute marijuana, and Count five alleged possession with intent to distribute marijuana.

While there is doubt as to whether these counts could properly be considered in determining the predicate felony offenses [*see Dunn v. United States, supra*] other acts not

mentioned in the indictment may have been improperly relied upon to sustain petitioner's conviction. 751 F.2d at 253, 254. Nothing in the trial court's charge to the jury required that they convict petitioner for the enterprise based solely upon felony violations of the Controlled Substance Act that the grand jury found he committed. The jury was instructed that they could consider *any* acts established by the evidence.

The affirmance of petitioner's conviction violated this Court's decisions in *Russell, Stirone,* and *Bain.* This Court should not allow the decision below to remain as precedent for the incorrect propositions asserted in it. If allowed to stand, the decision will only promote confusion and conflict among the circuits. *See, United States v. Winter,* 663 F.2d 1120, 1136, 1138 (1st. Cir. 1981), *cert. denied,* 460 U.S. 1011 (1983); *United States v. Cusmano,* 659 F.2d 714, 717-719 (6th Cir. 1981); *United States v. Stewart Clinical Laboratory, Inc.,* 652 F.2d 804, 807 (9th Cir. 1981); and *United States v. Crocker,* 568 F.2d 1049 (3rd Cir. 1977).

Now pending before this Court is another case addressing the need for conformity between the proof at trial and the allegations of the grand jury. *United States v. Miller,* 715 F.2d 1360 (9th Cir. 1983), *modified,* 728 F.2d 1269 *cert. granted,* 105 S.Ct. 78 (1984). There, in a mail fraud case, the prosecution conceded that one of the allegations of fraud in the indictment was not established by the evidence at trial. The Court of Appeals for the Ninth Circuit reversed the conviction because the petit jury could not find that the defendant participated in the same scheme for which the grand jury indicted him. 715 F.2d at 1362.

Here, as in *Miller,* it cannot be said that the petit jury found petitioner guilty of the same offense found by the grand jury. Like *Miller,* this case presents the question of whether a defendant has a right to be tried for the same

charges as those found by the grand jury and convicted of those particular acts.

The granting of this petition for writ of certiorari will allow a complete resolution of whether a defendant has the right to go to trial on the specific allegations returned by the grand jury: this petition involves the sufficiency of pleadings in enterprise counts [and by implication RICO cases]; *Miller,* involves the pleadings in mail fraud counts.

B.

AN INDICTMENT WHICH FAILS TO STATE THE ALLEGED PREDICATE FELONIES CONSTITUTING THE SERIES OF FELONIES NECESSARY TO ESTABLISH A CONTINUING CRIMINAL ENTERPRISE DENIES THE ACCUSED THE PROTECTION OF THE DOUBLE JEOPARDY CLAUSE.

Unless the three predicate felonies underlying an enterprise charge are set forth with particularity, a defendant loses the protection afforded him by the double jeopardy clause. A judgment in the first trial would not prevent a new indictment and trial on charges that might have been relied upon as predicate felonies by a jury determining guilt in that trial; there would be no way to establish that those felonies were relied upon as the predicate offenses.

The Court of Appeals disagreed with this position, saying that "an enterprise charge would seem to include any and all federal narcotics violations committed during the time period specified in the charge." 751 F.2d at 257. This position is directly contrary to that taken by the First Circuit in *United States v. Chagra,* 653 F.2d 26, 31-34 (1st Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), by the Fifth Circuit in *United States v. Oberski,* 734 F.2d 1030, 1033 (5th Cir. 1984) and, by implication, the Ninth Circuit,

United States v. Bendis, 681 F.2d 561, 565, n.5 (9th Cir. 1981), *cert. denied*, 459 U.S. 973 (1982). This question has not been directly confronted by this Court. *See Jeffers v. United States*, 432 U.S. 137 (1977); *Russell v. United States, supra; Blockburger v. United States*, 284 U.S. 299 (1932). The Courts of Appeals require guidance in this area. *cf. United States v. Brantley*, 733 F.2d 1429, 1436-37, nn. 14-16 (11th Cir. 1984).

This Court has granted certiorari to determine whether the double jeopardy clause prevents the government from prosecuting an enterprise count, relying upon a previously prosecuted substantive offense as a predicate act. *United States v. Garrett*, 727 F.2d 1003 (11th), *cert. granted*, 105 S.Ct. 787 (1984). Granting the writ here would allow a complete resolution of the double jeopardy problems presented by the continuing criminal enterprise statute, 21 U.S.C. § 848.

C.

THE FAILURE OF THE GRAND JURY TO STATE THE PREDICATE OFFENSES IT RELIED UPON TO FIND A CONTINUING CRIMINAL ENTERPRISE DENIES THE ACCUSED HIS SIXTH AMENDMENT RIGHT TO NOTICE OF THE CHARGE AGAINST HIM.

The Sixth Amendment guarantees an accused in a criminal prosecution the right "to be informed of the nature and cause of the accusation" against him. To accomplish this end, facts must be alleged with particularity in an indictment:

> "It is an elementary principle of criminal pleading, that where the definition of an offense, . . . , 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as

> in the definition; but it must state the specifics,—it must descend to particulars. . . .' [F]acts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances." *United States v. Cruikshank,* 92 U.S. 542, 557-58 (1875).

See United States v. Russell, supra, 369 U.S. at 765.

The Court of Appeals concluded here that petitioner was provided with actual notice of the charged series of felonies because Counts two and five charged felonies and various overt acts in Count two listed allegations comprising additional felonies. 751 F.2d at 256. However, in its opinion the court considered transactions not alleged in any substantive count or overt act: smuggling marijuana into Pascagoula, Mississippi (751 F.2d at 253) and unloading marijuana in Louisiana (751 F.2d at 254). Thus, petitioner did not have actual knowledge of these unspecified charges against him to satisfy due process. *See Cole v. Arkansas,* 333 U.S. 196, 201 (1948); *Goodloe v. Parratt,* 605 F.2d 1040, 1045-47 (8th Cir. 1979).

In arriving at the determination that due process notice was provided by Counts two and five, the Court of Appeals ignored the fact that each count of an indictment stands on its own absent language incorporating other counts. *Dunn v. United States, supra.* It also ignored the Sixth Amendment notice requirement. *United States v. Cruikshank, supra; United States v. Conlon,* 628 F.2d 150, 155 (D.C. Cir. 1980), *cert. denied,* 454 U.S. 1149 (1982).

The opinion of the Court of Appeals improperly applies previous decisions of this Court and sets dangerous precedent for interpreting the sufficiency of pleadings alleging continuing criminal enterprise violations.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: April 12, 1985

Respectfully submitted,

HOWARD L. WEITZMAN

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1311

United States of America,
Appellee,

vs.

Roosevelt Theodore Becton, Jr.
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 12, 1984

Filed: December 27, 1984

Before BRIGHT, JOHN R. GIBSON, and FAGG, Circuit Judges.

BRIGHT, Circuit Judge.

Roosevelt Theodore Becton stands convicted of conducting a continuing criminal enterprise[1] (Count I), two Travel Act[2] violations (Counts III and IV), and possession of cocaine[3] (Count VI, a misdemeanor). The district court[4] sentenced him to twenty-five years' imprisonment (without parole) on Count I and fined him $25,000. In addition, the

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[1]21 U.S.C. § 848 (1982).

[2]18 U.S.C. § 1952 (1982).

[3]21 U.S.C. § 844 (1982).

[4]The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

court imposed lesser concurrent prison terms on the other counts,[5] plus fines totalling an additional $25,000. Becton appeals. We affirm the conviction on Counts I, III, and VI and reverse on Count IV, the second Travel Act violation.

I

BACKGROUND

Count I of the indictment, alleging participation in a continuing criminal enterprise (CCE), constitutes the most serious charge against Becton. The language of the indictment essentially follows the statute, the government alleging that between January 1, 1977, and August 18, 1983, Becton knowingly and willfully engaged in a continuing criminal enterprise by violating felony provisions of the Controlled Substances Act,[6] in concert with at least five other persons over whom Becton occupied a position of organizer, supervisor, or manager, and that he obtained substantial income and resources from these activities. Count I does not identify the persons Becton allegedly supervised, nor does it specify the underlying violations of the Controlled Substances Act. Other counts in the indictment, however, do allege numerous felony violations of the Controlled Substances Act.

The violations alleged in Counts II and V (conspiracy and possession of eight and one-half tons of marijuana) qualify as the sort of felonies that could establish a criminal

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[5]Five years on Count III, concurrent to Count I. Five years on Count IV, concurrent to Count I, but consecutive to Count III. One year on Count VI, concurrent to Count I but consecutive to Counts III and IV.

[6]21 U.S.C. §§ 801-969 (1982).

enterprise.[7] In addition, Count II alleges a number of overt acts which amount to felonious conduct in furtherance of the conspiracy, including the procurement of large quantities of marijuana in Florida and Tennessee, distributing large amounts of marijuana in Missouri, and involvement with smuggling great quantities of marijuana into Texas.

The government presented evidence to support these charges, and to prove that Becton supervised at least five other persons in the criminal enterprise. It would serve no purpose to review all that evidence; we will only recount a few major incidents.[8] Edward Hindelang, a major marijuana importer, testified that his organization sold between $3 and $4.5 million worth of marijuana to Becton between 1976 and 1980. Steven Helmich testified that he once assisted Becton in weighing a truckload of marijuana, which he subsequently delivered to three different locations in St. Louis at Becton's direction. Helmich also testified that Becton sold $1 million worth of marijuana to Tony Olivastro between 1977 and 1979. Nathaniel Yancy testified that he purchased large quantities of marijuana from Becton, citing one purchase of 2,000 pounds. He also testified that he once delivered 4,000 pounds of marijuana to a buyer at Becton's direction. Becton arranged for the distribution of 7,000 pounds of marijuana from Fort Lauderdale, Florida in January 1980. Finally, the testimony of several witnesses established that Becton owned one-third of an 18,000 pound shipment of marijuana seized in St. Louis County, Missouri in February 1980.

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[7]The district court instructed the jury that the crimes in Counts II and V could be considered as part of the series of felonies underlying the CCE charge. The government withdrew these charges before the case went to the jury because they were considered lesser included offenses in the CCE charge.

[8]The facts regarding Count VI (possession of cocaine) are not stated because Becton does not contest his conviction on that count.

In addition to the possession and sale of marijuna, Becton indirectly and directly participated in smuggling-related activities. In August or September of 1979, the Hindelang organization smuggled 228,000 pounds of marijuana into Pascagoula, Mississippi, by ship. Two of Becton's relatives helped unload the vessel, and Becton received $80,000 for their services. In December of 1979, Hindelang attempted to smuggle another shipload of marijuana into Galveston-Houston, Texas. Becton arranged to have four of his relatives assist in unloading the ship, for which he would receive $20,000 per person, per day. However, state and federal agents detected the operation and arrested the participants, whereupon Becton arranged for Hindelang to provide his relatives with money for bail and attorneys' fees.

Turning to the Travel Act convictions, Counts III and IV of the indictment alleged that, on two occasions in January 1980, Becton travelled to Fort Lauderdale, Florida with the intent to promote an unlawful activity, and that while in Florida he performed or attempted to perform some act of promoting that activity. In support of these charges, the government proved that Becton procured the use of a house in Fort Lauderdale during January 1980. He travelled from Missouri to Florida twice that month, accompanied by Nathaniel Yancy, for the stated purpose of obtaining marijuana. During the first trip, Yancy and others distributed 7,000 pounds of marijuana from the house in Fort Lauderdale to a number of individual buyers, then Becton and Yancy returned to St. Louis. Becton did not manage to acquire any marijuana during the second trip. He informed Yancy that they would not be driving any marijuana back to St. Louis; instead, it would be delivered to St. Louis by a supplier.

After a two-week trial, the jury found Becton guilty on the CCE, Travel Act, and possession of cocaine charges.

The district court denied Becton's motion for acquittal and entered a judgment of conviction on all counts.

Although appellant raises nine separate allegations of error, his arguments may be summarized as follows:

1. Insufficiency of the evidence to support each conviction, except the cocaine misdemeanor;

2. Errors in the admission of evidence relating to co-conspirators' statements, the admission of other crimes' evidence, the admission of testimonial summarization of evidence, and in permitting improper use of grand jury testimony;

3. Defectiveness of the indictment in Count I (CCE) in that the indictment failed to specify the requisite three or more predicate offenses;

4. Preindictment delay; and

5. Unconstitutionality of sentence under Count I or, alternatively, disproportionality of sentence.

We consider first those issues relating to Count I.

II

SUFFICIENCY OF THE EVIDENCE

A. The Continuing Criminal Enterprise.

We recently had occasion to discuss the evidence necessary to support a CCE conviction. In *United States v. Samuelson*, 697 F.2d 255 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 1314 (1984), we stated:

> A conviction for violation of [the CCE statute] requires the establishment of the following elements: the commission of a continuing series of violations of federal narcotics laws, in concert with five or more persons, by a person occupying a management or organizing position, who receives substantial income therefrom.

Id. at 259. We noted that other courts have defined a "series of violations" as three or more violations. *Id.* (citing *United States v. Valenzuela,* 596 F.2d 1361, 1364-65 (9th Cir.), *cert. denied,* 444 U.S. 865 (1979)).

Becton argues that the evidence in this case does not establish that he organized, managed, or supervised five or more persons. He does not contest the proof concerning other elements of the CCE conviction, and we are satisfied that those elements have been proved by sufficient evidence. The facts set forth above establish that Becton directed the activities of Helmich, Yancy, and his relatives who unloaded marijuana from ships in Louisiana and Texas. In addition, evidence indicated that Becton coordinated a meeting of at least four other drug dealers at his condominium in Memphis, Tennessee, for the purpose of obtaining marijuana from an airplane scheduled to land in Arkansas.

We note that the supervisory relationship specified in the CCE statute need not have existed with regard to the five persons at the same time, that those five persons need not have acted in concert, and that the same type of supervision need not have been exercised over each person. Furthermore, the government need not prove that the supervisor had personal contact with each person. *United States v. Dickey,* 736 F.2d 571, 587 (10th Cir. 1984); *United States v. Phillips,* 664 F.2d 971, 1013 (5th Cir. 1981), *cert. denied,* 102 S.Ct. 2965 (1982); *United States v. Bolts,* 558 F.2d 316, 320 (5th Cir.), *cert. denied,* 434 U.S. 930 (1977), 439 U.S. 898 (1978). In addition, it is irrelevant that other persons, such as Hindelang, may have exercised supervision superior to Becton's. A defendant need not be the dominant organizer or manager of a criminal enterprise; the statute requires only that he occupy some managerial position. *United States v. Oberski,* 734 F.2d 1030, 1032 (5th Cir. 1984); *United States v. Losada,* 674 F.2d 167, 174 (2d Cir.), *cert. denied,* 457 U.S. 1125 (1982). Viewing the evidence in

the light of the above stated principles, we are satisfied that the government presented sufficient evidence to prove that Becton organized, supervised, or managed at least five other persons in this criminal enterprise. Accordingly, we reject Becton's challenge to the sufficiency of the government's evidence on the CCE charge.

B. Travel Act Violations.

The Travel Act, 18 U.S.C. § 1952(a) (1982), provides as follows:

> Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

The jury found that Becton violated this statute on two occasions, relating to his two trips to Fort Lauderdale in January 1980. He argues that the evidence does not support the verdict because the government failed to introduce direct evidence that he committed or attempted to commit some particular act in furtherance of the unlawful activity after he arrived in Florida.

With regard to the first trip in January 1980, the evidence shows that Becton procured a house in Fort Lauder-

dale and directed Nathaniel Yancy to accompany him from Missouri to Florida for the stated purpose of acquiring marijuana. During Becton's stay in Florida, Yancy and others distributed over 7,000 pounds of marijuana from the house in Fort Lauderdale. We must consider this evidence in the light most favorable to the verdict, accepting all reasonable inferences which tend to support that verdict. *United States v. Wilkerson,* 691 F.2d 425, 427 (8th Cir. 1982); *United States v. Taylor,* 599 F.2d 832, 837-38 (8th Cir. 1979). We conclude that the evidence adequately supported the jury's verdict as to Count III.

Turning to the second Travel Act violation (Count IV), we observe that the evidence differs in one significant respect; neither Becton nor anyone in his entourage actually acquired any marijuana during the second trip to Florida in January of 1980. The record only shows that Becton travelled to Florida with the *intent* to acquire marijuana. Intent alone does not satisfy the requirements of the Travel Act. We agree with Becton that the government failed to prove that he performed or attempted to perform some act in furtherance of his illegal activity after his arrival in Florida. Accordingly, we vacate Count IV of the conviction and remand the case to the trial court for an appropriate adjustment of the sentence.

III

EVIDENTIARY MATTERS

A. Co-Conspirator's Statements.

The trial court allowed government witnesses to testify regarding out-of-court statements by Freddie Fitzgerald and Tony Olivastro. The court ruled that the statements were not hearsay under Fed. R. Evid. 801(d)(2)(E) (the co-conspirator exception). Becton argues that the court

should have excluded both statements because neither came within the stated exception, and because their admission violated his rights under the confrontation clause of the sixth amendment.

The government offered the statements in question to prove that Becton owned the marijuana referred to in Count V of the indictment (possession with intent to distribute). These statements are not the only proof of record concerning Becton's ownership. Becton told Yancy that he owned one-third of this marijuana, and Yancy testified that he saw Becton visit the warehouse containing the marijuana at midnight on February 6, 1980. Becton stayed for one hour, then left with one pound of marijuana. In addition to Yancy's testimony, Ralph Jude, an inmate at the county jail during the period of Becton's incarceration there, testified that he overheard Becton say he had been arrested because he had several tons of marijuana in a warehouse. We conclude that this evidence established that Becton possessed the marijuana covered by Count V, rendering any error in admitting the statements of Olivastro and Fitzgerald harmless beyond a reasonable doubt. *See United States v. Massa,* 740 F.2d 629, 640-41 (8th Cir. 1984).

Furthermore, as related in n.7, *supra,* the government withdrew Count V before the case went to the jury, so the possession charge only has significance as one of the felonies underlying Becton's CCE conviction. The CCE conviction could be affirmed in this case without reference to the Count V possession charge, because the record contains sufficient evidence of other drug-related felonies to establish the series of violations required by the CCE statute. Accordingly, the admission of the Fitzgerald and Olivastro statements did not constitute reversible error.

B. Other Evidentiary Objections.

We have reviewed Becton's other arguments regarding the admission of "other crimes" evidence, grand jury testimony, and summarization evidence, and find them to be without substantial merit.

IV

DEFECTIVENESS OF THE INDICTMENT

Count I of the indictment did not list the specific violations of federal narcotics law constituting the alleged continuing criminal enterprise. Becton contends that this causes the indictment to be impermissibly vague. As a general rule, due process requires that the indictment give a defendant notice of each element of the charge against him so that he can prepare an adequate defense. However, if the defendant has actual notice of the charges, due process may be satisfied despite an inadequate indictment. *Goodloe v. Parratt,* 605 F.2d 1041, 1045-46 (8th Cir. 1979). In this case, other counts of the indictment gave Becton notice of the underlying felonies. Counts II and V specifically charged two narcotics law violations and the "overt acts" section of Count II listed allegations comprising additional violations. Significantly, Becton fails to allege that any of the felonious activities proved at trial took him by surprise. Furthermore, he did not raise this objection to the indictment before or during trial, and on appeal he raised it for the first time in his reply brief. These facts lead us to conclude that the government's failure to specify underlying felonies in Count I of the indictment did not prejudice Becton in any way:

Becton also argues that the underlying felonies must always be listed in a CCE indictment to protect defendants from the possibility of double jeopardy. If the felonies are are not specified, a defendant could be acquitted on the

CCE charge, then tried again for the substantive felonies, because he would have no way to show that those felonies were tried as predicate offenses at his first trial. We do not consider this a realistic possibility. A CCE charge would seem to include any and all federal narcotics violations committed during the time period specified in the charge. Thus, an acquittal on the CCE charge would in all likelihood bar further prosecution for any acts that would constitute underlying violations, and a CCE conviction would include all underlying felonies committed during the time period covered by the indictment.

We do not, by this opinion, necessarily approve of the government's handling of the indictment in this case. We think it would be far preferable to list the felonies comprising the criminal enterprise in the CCE count of an indictment, thereby eliminating the potential problems suggested by Becton. However, we conclude on the facts in this case, that Becton received adequate notice of the charges against him and had an opportunity to present an adequate defense.

In a related vein, Becton contends that the instructions to the jury were inadequate because they did not specify the alleged felonies underlying the CCE charge. The government in this case initially offered an instruction that did not specify the underlying felonies. Becton objected on the grounds of vagueness, and the court ordered the government to submit a more specific instruction. Government attorneys met with Becton's counsel, but the parties could not agree on a more specific instruction. The court then gave the government's original instruction to the jury, without objection by Becton. Under these circumstances, we conclude that Becton has waived his objection to the jury instruction. Moreover, the instructions adequately defined the felonies that can underlie a CCE charge.

V

PREINDICTMENT DELAY

The government filed its first indictment against Becton on March 31, 1983, over three years after the raid on the CDY warehouse. Becton claims that this delay prejudiced him by depriving him of the opportunity to obtain an independent analysis of marijuana seized in Louisiana, Texas, and Missouri. Numerous government witnesses, including expert chemists, testified that the substance seized in each instance was marijuana. All of these witnesses were subject to cross-examination. Furthermore, the government retained samples of the marijuana from Texas and Missouri, which were available for independent analysis. Under these circumstances, we see no possibility that Becton experienced prejudice because of the delay. In the absence of prejudice, we will not reverse on the grounds of preindictment delay. *United States v. Rogers,* 639 F.2d 438, 440-41 (8th Cir. 1981); *see United States v. Lovasco,* 431 U.S. 783, 790 (1976).

VI

CONSTITUTIONAL DEFECTS IN THE CCE STATUTE

Becton contends that the words "organizer, supervisor, or manager" as used in the CCE statute are impermissibly vague. This challenge has already been rejected, in this and other circuits. *United States v. Losada,* 674 F.2d 167, 174-75 n.5 (2d Cir.) *cert. denied,* 457 U.S. 1125 (1982); *United States v. Valenzuela,* 596 F.2d 1361, 1366 (9th Cir. 1979); *cert. denied,* 444 U.S. 865 (1980); *United States v. Kirk,* 534 F.2d 1262, 1277-78 (8th Cir. 1976). Becton further argues that the statute denies him due process because its prohibition of parole or probation deprives the sentencing judge of essential discretion. This challenge has also been consistently rejected. *See United States v. Phil-*

lips, 664 F.2d 971, 1042-43 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 459 U.S. 906 (1982); *United States v. Sperling*, 560 F.2d 1050, 1057 (2d Cir. 1977).

With regard to Becton's sentence, however, we observe that our vacation of one of the Travel Act convictions may be a factor for the district court to take into account should the defendant seek reconsideration of the sentence under Fed. R. Crim. P. 35.

VII

CONCLUSION

We have carefully reviewed the record in this case and conclude that Becton's second Travel Act conviction, under Count IV of the indictment, must be vacated. We affirm the judgment of the district court in all other respects.

Affirmed except for Count IV which is reversed and the sentence on that count is set aside.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 84-1311-EM.

UNITED STATES OF AMERICA,
Appellee,

VS.

ROOSEVELT THEODORE BECTON, JR.,
Appellant.

Appeal from the United States
District Court for the
Eastern District of Missouri

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

February 11, 1985

APPENDIX C

UNITED STATES CONSTITUTION:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

TITLE 21 UNITED STATES CODE § 848:

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that

if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States —

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

Pub.L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265.

APPENDIX D

FILED
APRIL 21, 1983

EYVON MENDENHALL, CLERK
U.S. DISTRICT COURT
E. DISTRICT OF MO.

No. 83-67CR(4)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ROOSEVELT THEODORE BECTON, JR., et al.,
Defendants.

EVIDENTIARY HEARING AND/OR
ORAL ARGUMENT REQUESTED

MOTION OF DEFENDANT TO DISMISS INDICTMENT

Comes now defendant Roosevelt Theodore Becton, Jr. and moves the Court for an order dismissing the indictment in this cause for the following reasons:

1. The indictment is vague, uncertain, indefinite, ambiguous, multiplicitous and duplicitous, and does not contain a plain, concise and definite written statement of the essential facts constituting the alleged offense charged, contrary to the provisions of Rule 7(c) of the Federal Rules of Criminal Procedure.

2. The indictment fails to inform the defendant of the nature and cause of the accusation against him, contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

3. The indictment fails to charge sufficient facts to constitute an offense against or a violation of the laws of the United States so as to permit the defendant to raise a defense of prior jeopardy if further or other proceedings are ever instituted against him.

4. The indictment was returned by a Grand Jury which did not have adequate evidence to return the indictment, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

5. The indictment was not based upon sufficient competent evidence having been presented before the Grand Jury returning the indictment and is based on hearsay and other incompetent evidence presented to the Grand Jury.

6. The indictment was returned by a Grand Jury which was improperly constituted and lacked jurisdiction to return the instant indictment.

7. The indictment attempts to charge the defendant under laws which are illegal, void and unconstitutional as applied to the defendant in the instant indictment.

8. The indictment should be dismissed on such other grounds as may appear at the hearing on this and other motions or thereafter.

Respectfully submitted,

ARTHUR S. MARGULIS, #16906
7701 Forsyth Blvd., Suite 1070
St. Louis, Missouri 63105
(314) 721-6677
Attorney for Defendant Becton

Copy of the foregoing mailed this 21st day of April, 1983, to Office of United States Attorney, 1114 Market Street, St. Louis, Missouri 63101.

ARTHUR S. MARGULIS

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED April 21, 1983

EYVON MENDENHALL, CLERK
U. S. DISTRICT COURT
E. DISTRICT OF MO.

No. 83-67CR(4)

UNITED STATES OF AMERICA,
Plaintiff,

v.

ROOSEVELT THEODORE BECTON, JR., et al.,
Defendants.

EVIDENTIARY HEARING AND/OR
ORAL ARGUMENT REQUESTED

MOTION OF DEFENDANT ROOSEVELT THEODORE BECTON, JR. FOR BILL OF PARTICULARS

Comes now the defendant Roosevelt Theodore Becton, Jr., by and through his attorney, Arthur S. Margulis, pursuant to Rule 7, Federal Rules of Criminal Procedure, and moves the Court to enter an Order requiring the government to file a Bill of Particulars in the following respects:

COUNT I

1. State the locations within the Eastern District of Missouri, and outside the Eastern District of Missouri, the defendant Roosevelt Theodore Becton, Jr. allegedly engaged in a continuing criminal enterprise, as charged in Count I ("elsewhere").

2. State with particularity the "other violations of said statutes which were part of a continuing series of violations of the Controlled Substance Act."

3. State the names and addresses of the "at least five other persons" with whom the defendant Becton acted "in concert."

4. State with particularity what acts of defendant Becton and the dates on which said acts were committed that support the allegation that defendant Becton "occupied a position of organizer, supervisor and other positions of management."

5. List with particularity the "substantial income and resources" defendant Becton allegedly "obtained" from the "continuing series of violations."

COUNT II

1. State the locations within the Eastern District of Missouri and outside the Eastern District of Missouri defendant Becton allegedly engaged in activity charged in Count II ("elsewhere").

2. State the names and addresses of individuals or entities known to the Grand Jury or government, or whose identities may later become known, who are referred to in various paragraphs of Count II as "others both known and unknown to this Grand Jury."

3. State the dates and locations Edward Hindelang "imported and caused to be imported, large quantities of marijuana into the United States of America," and on each occasion the recipient(s) of said importation.

4. State the addresses of the "businesses or residences" which the defendants Eddington and Young allegedly consented to be used "to store large quantities of marijuana."

5. State with particularity what acts of defendant Becton and the dates on which said acts were committed which support the allegation that defendant Becton "would recruit, organize, supervise and manage" various distributors and couriers for marijuana.

6. State the names and addresses of the "various distributors and couriers" which defendant Becton allegedly recruited, organized, supervised and managed.

7. State the dates upon which the locations, the amounts of currency, the amounts of marijuana, and the purchasers of marijuana, which defendant Becton allegedly "collect[ed] and cause(d) to be collected proceeds from the sale of the marijuana."

8. State with particularity when, where and to whom in "early 1977" the defendant Becton "distributed and caused to be distributed a quantity of marijuana," the amount of marijuana distributed, and the proceeds derived therefrom, as stated in Overt Act number 1.

9. State with particularity the dates defendants Becton and Dietzel allegedly "traveled to Florida to obtain a quantity of marijuana;" the location in Florida the defendants allegedly visited; with whom they met; and the names and addresses of the "other conspirators, both known and unknown to this Grand Jury" for whom the marijuana was allegedly intended, as stated in Overt Act number 2.

10. State specifically where and with whom defendants Becton and Dietzel are alleged to have met in Memphis, Tennessee, as stated in Overt Act number 3.

11. State specifically where and to whom defendants Becton and Dietzel allegedly distributed marijuana, the amount of marijuana allegedly distributed, and the amount of alleged proceeds derived therefrom, as stated in Overt Act number 4.

12. State specifically when, "prior to December 19, 1979," the unindicted co-conspirators allegedly travelled to Houston, Texas, to aid in offloading of marijuana, the amount of marijuana allegedly offloaded, and who specifically they allegedly aided, as stated in Overt Act number 5.

13. State specifically when, "prior to December 19, 1979," Edd Johnson Martin was given the telephone number "314-261-4205," who gave him the telephone number, whose number he was given, the manner in which he was given the number, and how the giving of the number was in furtherance of the alleged conspiracy, as stated in Overt Act number 6.

14. State with particularity the identities of the "other of marijuana allegedly obtained, and the consideration allegedly paid, by defendants Becton and Dietzel in their alleged visit to Florida "on or about 1-15-80", as stated in Overt Act number 7.

15. State with particularity the "known but unindicted co-conspirators," the resident or residents and owner or owners of "3331 Union Avenue, St. Louis, Missouri," the amount of marijuana allegedly obtained, and the consideration allegedly paid therefor, as stated in Overt Act number 8.

16. State with particularity, the "other co-conspirators" who allegedly "traveled to Florida to obtain a quantity of

marijuana" with defendant Becton "on or about 1-31-80", state specifically where in Florida they allegedly visited, with whom they allegedly met, the amount of marijuana allegedly obtained, and the consideration allegedly paid therefor, as stated in Overt Act number 9.

17. State with particularity the "co-conspirators" who on "Feb. 7, 1980" allegedly travelled to "9128 St. Charles Rock Rd., St. Louis County, Missouri," the resident or residents and owner or owners of said property, the amount of marijuana allegedly obtained, and the consideration allegedly paid therefor, as stated in Overt Act number 10.

18. State with particularity by time, place, and participants, every act in furtherance of the conspiracy alleged in Count II which the government intends to prove at trial and which is not already set out in the Indictment.

COUNT III

1. State with particularity the exact date(s) "during early to mid-January, 1980," the defendant Becton allegedly travelled in interstate commerce regarding the allegations contained in Count III.

2. State with particularity the "others" whom allegedly accompanied defendant Becton in interstate travel regarding the allegations contained in Count III.

3. State with particularity the locations in Florida to which defendant Becton allegedly travelled regarding the allegations contained in Count III.

4. State with particularity what acts of defendant Becton and the dates on which said acts were committed that support the allegations that defendant Becton travelled to Florida to "promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of an unlawful activity," as stated in Count III.

COUNT IV

1. State with particularity the "others" whom allegedly accompanied defendant Becton in interstate travel regarding the allegations contained in Count IV.

2. State with particularity the locations in Florida to which defendant Becton allegedly travelled regarding the allegations contained in Count IV.

3. State with particularity what acts of defendant Becton and the dates on which said acts were committed that support the allegations that defendant Becton travelled to Florida to "promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of an unlawful activity," as stated in Count IV.

COUNT V

1. State with particularity, the exact location in St. Louis County, Missouri, defendant Becton allegedly possessed marijuana with the intent to distribute.

The foregoing information is essential to assist defendant Becton in understanding the charges against him, in preparing his defense, and in protecting him from double jeopardy.

Office - Supreme Court, U.S.
FILED
MAY 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1622

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROOSEVELT THEODORE BECTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1622

ROOSEVELT THEODORE BECTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that an indictment under the continuing criminal enterprise (CCE) statute must enumerate the specific offenses constituting the continuing series of drug violations.

1. Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848; two counts of interstate travel in aid of racketeering enterprises, in violation of 18 U.S.C. 1952; and one count of possessing cocaine, in violation of 21 U.S.C. 844. He was sentenced to 25 years' imprisonment and fined $25,000 on the CCE count. On the remaining counts, he received lesser concurrent prison terms and fines totaling an additional $25,000. The court of appeals reversed on one of the interstate travel counts and affirmed in all other respects (Pet. App. A1-A13; 751 F.2d 250).

The evidence at trial, which petitioner does not challenge, is outlined in the opinion of the court of appeals (Pet. App. A3-A4). In brief, it showed that between 1976 and 1980 petitioner purchased $3-$4.5 million worth of marijuana from an organization headed by Edward Hindelang. On one occasion during that period, Steven Helmich delivered a truckload of marijuana to three locations in St. Louis at petitioner's direction. In addition, between 1977 and 1979 petitioner sold $1 million worth of marijuana to Tony Olivastro. Petitioner also sold large quantities of marijuana, including one sale of 2,000 pounds, to Nathaniel Yancy; moreover, on one occasion Yancy delivered 4,000 pounds of marijuana to a buyer at petitioner's direction. Finally, petitioner owned one-third of an 18,000 pound shipment of marijuana that was seized in St. Louis County, Missouri, in February 1980.

In addition to possessing and selling marijuana, petitioner participated in marijuana smuggling activities. In August or September 1979, the Hindelang organization smuggled 228,000 pounds of marijuana into Pascagoula, Mississippi, by ship. Two of petitioner's relatives helped to unload the vessel, and petitioner received $80,000 for their services. In December 1979, Hindelang attempted to smuggle another shipload of marijuana into Galveston-Houston, Texas. Petitioner arranged to have four of his relatives assist in unloading the ship, for which he was supposed to receive a daily fee of $20,000 for each person. However, state and federal agents uncovered the operation and arrested the participants. Petitioner then arranged for Hindelang to provide his relatives with money for bail and attorney's fees.

In January 1980, petitioner secured the use of a house in Fort Lauderdale, Florida. Accompanied by Yancy, he traveled from Missouri to Florida twice that month for the purpose of obtaining marijuana. During the first trip,

Yancy and others distributed 7,000 pounds of marijuana from the Fort Lauderdale house to a number of buyers; petitioner and Yancy then returned to St. Louis. Petitioner did not manage to acquire any marijuana during the second trip, but he informed Yancy that marijuana would be delivered to St. Louis by a supplier.

2. Petitioner contends that the CCE count in the indictment was defective because it simply tracked the language of the statute and did not set out the specific offenses constituting the continuing series of drug violations. However, while petitioner did move to dismiss the indictment on the general ground that it was vague and indefinite and did not adequately inform him of the charges, he did not specifically object to the failure of the CCE count to enumerate the predicate drug offenses. Accordingly, as the court of appeals held (Pet. App. A10), petitioner's challenge to the indictment was waived. See Fed. R. Crim. P. 12(b)(2) and (f).[1]

In any event, this issue does not warrant further review. Petitioner has cited no case that has adopted his argument, and the Court recently declined to review the identical question in *Sterling* v. *United States,* cert. denied, No. 84-1177 (May 13, 1985). For the reasons stated in our brief in opposition in *Sterling* (a copy of which is being sent to counsel for petitioner), the instant petition should likewise be denied. We add the following to our submission in *Sterling*.

First, because a CCE indictment need not set out the specific predicate offenses, this case involves no issue of an amendment to the indictment or a conviction on an offense that the grand jury did not charge. For this reason, the cases

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[1]Indeed, petitioner did not even raise this contention until his reply brief in the court of appeals.

cited by petitioner (Pet. 5, 6-8) are inapposite.[2] Nor does it involve an indictment that is legally insufficient on its face because of the failure to allege a necessary element of the charged offense.[3] Finally, the court of appeals' decision in *United States* v. *Miller*, 715 F.2d 1360 (9th Cir. 1983), modified, 728 F.2d 1269 (9th Cir. 1984), upon which petitioner relies (Pet. 4, 8-9), has now been reversed by this Court (No. 83-1750 (Apr. 1, 1985)), and the Court's ruling provides no support for the argument that petitioner advances.

Petitioner also argues (Pet. 9) that "[u]nless the three predicate felonies underlying an enterprise charge are set forth with particularity, a defendant loses the protection afforded him by the double jeopardy clause" because a "judgment in the first trial would not prevent a new indictment and trial on charges that might have been relied upon as predicate felonies by a jury." However, petitioner has not been subject to successive prosecutions for CCE and substantive predicate offenses, and therefore his concern is, at best, premature.[4] More importantly, in assessing a claim under the Double Jeopardy Clause that a defendant has been prosecuted twice for the "same offense," courts are not

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[2]See *Russell* v. *United States*, 369 U.S. 749 (1962); *Stirone* v. *United States*, 361 U.S. 212 (1960); *Ex parte Bain*, 121 U.S. 1 (1887); *United States* v. *Cusmano*, 659 F.2d 714 (6th Cir. 1981); *United States* v. *Stewart Clinical Laboratory, Inc.*, 652 F.2d 804 (9th Cir. 1981); *United States* v. *Crocker*, 568 F.2d 1049 (3d Cir. 1977).

[3]See *United States* v. *Winter*, 663 F.2d 1120, 1138 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).

[4]Moreover, for the reasons stated in our brief in *Garrett* v. *United States*, No. 83-1842 (argued Jan. 16, 1985), we do not believe that the Double Jeopardy Clause bars successive prosecutions on CCE and substantive predicate charges. (A copy of our brief in *Garrett* is being sent to counsel for petitioner.) Because successive prosecutions have not been brought against petitioner, there is no need to hold this petition pending decision in *Garrett*.

limited to considering the face of the first indictment but instead review the entire record. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 764 (1962); *United States* v. *Levine*, 457 F.2d 1186, 1189 (10th Cir. 1972) ("The sufficiency of an indictment is not determined by whether it alone will protect the accused against double jeopardy. The entire record of the proceedings may be referred to in the event of a subsequent similar prosecution.").

Finally, petitioner asserts (Pet. 10-11) that the failure of the CCE count to enumerate the predicate offenses denied him fair notice of the charges against him. While, as the court of appeals noted (Pet. App. A11), it might be desirable for indictments to be drafted with greater particularity, the CCE count in this case — which tracked the language of the statute and specified the time period during which the offense was alleged to have been committed — was adequate. Furthermore, the court of appeals correctly concluded (Pet. App. A10) that the other counts in the indictment, although not specifically incorporated in the CCE count, apprised petitioner of the drug activities underlying the CCE charge. Cf. *Dunbar* v. *United States*, 156 U.S. 185, 190 (1895); *United States* v. *Chilcote*, 724 F.2d 1498, 1504-1505 (11th Cir. 1984), cert. denied, No. 83-6624 (May 29, 1984).[5] Such actual notice sufficed to sustain the charges against petitioner (see *Goodloe* v. *Parratt*, 605 F.2d 1041, 1045-1046 (8th Cir. 1979)), and there is no occasion for further review of this fact-bound issue.[6]

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[5]Petitioner's reliance (Pet. 5, 11) on *Dunn* v. *United States*, 284 U.S. 390 (1932), is entirely misplaced. The issue in *Dunn* was the permissibility of inconsistent jury verdicts on separate counts, not the sufficiency of the indictment.

[6]To the extent that the jury was allowed (quite properly, in our view) to rely on evidence of drug violations that were not identified in the indictment (see Pet. 8), petitioner failed to preserve an objection to those instructions at trial (see Pet. App. A11).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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